Mohd Raymee bin Ismail v Ketua Komandan, Pusat Serenti Tiang Dua & Anor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO 44–46 OF 1998
ABDUL WAHAB J
24 AUGUST 1998

Criminal Procedure *— Habeas corpus — Detention of drug addict — Non-compliance with provisions of Drug Dependants (Treatment and Rehabilitation) Act 1983 — Applicant not given rehabilitation officer's report — Report was not explained to applicant — Whether application by way of writ of habeas corpus is proper procedure*

This was an application by way of writ of habeas corpus to quash the order of the magistrate, ordering that the applicant be admitted to the custody of Pusat Pemulihan Serenti, Tiang Dua Malacca for two years. The application was made on grounds that the applicant was not given a copy of the report by the rehabilitation officer and that the report, although was read, was not explained to him, thus resulted in the order of the magistrate being not in compliance with s 6(3) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 ('the Act'). Not contesting the allegations of the applicant, the respondents on the other hand objected to the application itself by saying that it should be done by way of certiorari and not by writ of habeas corpus. The fundamental issue to be determined was whether in such an application, a writ of habeas corpus was the proper procedure to be adopted to quash the earlier order.

Held, allowing the application:

(1) Not supplying a copy of the report by a rehabilitation officer to the applicant, as alleged at a para 5 of the supporting affidavit and which allegation was not denied by the respondents, was a clear breach of s 6(3) of the Act. Since the consequence of an order under s 6 of the Act is penal in character, there must be strict compliance with the terms of the legislation authorizing the order (see p 383B–C).

(2) Not all orders under s 6 of the Act involve detention. Where an order does not involve detention, the only course to quash such an order is an application in certiorari. However, in an order that involves detention, there is nothing to say that an application in habeas corpus is not available (see p 384C–D).

(3) To restrict a person by requiring that he must apply by way of certiorari rather than by habeas corpus would be contrary to the spirit and intent of art 5(2) of the Federal Constitution which does not impose a restriction as to the procedure of how a complaint is to be made. Article 5(2) not merely empowers, but requires a High Court or a judge thereof, upon receiving a complaint and unless he is satisfied the detention is lawful, to issue an order for the detenue to be produced before the court and release him.

A While certiorari is a discretionary power of the High Court, a habeas corpus is as of right under art 5(2). Where it is not disputed that a copy of the report of the rehabilitation officer has not been supplied to the applicant, it is abundantly clear that his detention under s 6 of the Act is unlawful and the court must order the persons holding him to produce him before the court to be released (see p 384D–F).

B

[Bahasa Malaysia summary

C Ini merupakan suatu permohonan melalui writ habeas corpus untuk membatalkan perintah majistret, yang memerintahkan bahawa pemohon diletakkan di bawah jagaan Pusat Pemulihan Serenti, Tiang Dua Melaka selama dua tahun. Permohonan telah dibuat atas alasan bahawa pemohon tidak diberikan sesalinan laporan oleh pegawai pemulihan dan bahawa laporan tersebut, walaupun telah dibaca, tidak dijelaskan kepadanya, justeru itu mengakibatkan perintah majistret

D tidak mematuhi s 6(3) Akta Penagih Dadah (Rawatan dan Pemulihan) 1983 ('Akta tersebut'). Penentang-penentang, yang tidak mencabar tohmahan pemohon, sebaliknya membantah terhadap permohonan itu sendiri dengan mengatakan bahawa ia harus dilakukan melalui certiorari dan bukannya dengan writ habeas corpus. Isu asas untuk diputuskan adalah sama ada dalam permohonan

E sedemikian, suatu writ habeas corpus adalah prosedur yang wajar diterimapakai bagi membatalkan perintah yang lebih awal tersebut.

Diputuskan, menolak permohonan:

(1) Perbuatan tidak menyediakan sesalinan laporan tersebut oleh

F pegawai pemulihan kepada pemohon, seperti yang dikatakan dalam perenggan 5 afidavit yang menyokong dan pengataan yang mana tidak dinafikan oleh penentang-penentang, merupakan pelanggaran yang jelas ke atas s 6(3) Akta tersebut. Oleh kerana akibat suatu perintah di bawah s 6 Akta tersebut adalah bersifat menghukum, mestilah terdapat pematuhan ketat dengan terma

G perundangan yang membenarkan perintah tersebut (lihat ms 383B–C).

(2) Bukan semua perintah di bawah s 6 Akta tersebut melibatkan penahanan. Di mana suatu perintah tidak melibatkan penahanan, satu-satunya cara untuk membatalkan perintah sedemikian

H adalah permohonan menerusi certiorari. Walau bagaimanapun, dalam suatu perintah yang melibatkan penahanan, tiada apa-apa untuk mengatakan bahawa satu permohonan dalam habeas corpus tidak boleh dibuat (lihat ms 384C–D).

(3) Untuk menyekat seseorang dengan menghendakinya memohon melalui certiorari dan bukannya melalui habeas corpus adalah

I bertentangan dengan semangat dan tujuan perkara 5(2) Perlembagaan Persekutuan yang tidak mengenakan had ke atas prosedur tentang bagaimana suatu aduan harus dibuat.

Perkara 5(2) bukan sahaja memberi kuasa kepada, tetapi menghendaki Mahkamah Tinggi atau hakimnya, setelah menerima aduan dan melainkan beliau berpuas hati penahanan tersebut adalah sah, mengeluarkan suatu perintah untuk orang tahanan dikemukakan di hadapan mahkamah dan membebaskannya. Manakala certiorari merupakan suatu kuasa Mahkamah Tinggi yang berdasarkan budi bicara, habeas corpus adalah mengikut hak di bawah perkara 5(2). Di mana ia tidak dipertikaikan bahawa sesalinan laporan pegawai pemulihan tidak diberikan kepada pemohon, adalah amat jelas bahawa penahanannya di bawah s 6 Akta tersebut adalah tidak sah dan mahkamah mestilah memerintah orang yang menahannya supaya mengemukakannya di hadapan mahkamah untuk dibebaskan (lihat ms 384D–F).]

Notes

For cases on application by way of writ of habeas corpus for unlawful detention of drug addict, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1361–1363.

Cases referred to

Ahmad Bashid Abdul Malek & Yang lain v Timbalan Menteri Dalam Negeri, Malaysia & Yang lain [1998] 6 MLJ 112 (refd)

Amand v Home Secretary & Anor [1943] AC 147 (refd)

Ang Gin Lee v PP [1991] 1 MLJ 498 (refd)

Bohari Sukimin v Ketua Institusi Pusat Serenti Rawang & Anor Application No 44–4–98 (High Court, Kuala Lumpur) (unreported) (folld)

Daud bin Salleh v Superintendent, Sembawang Drug Rehabilitation Centre [1981] 1 MLJ 191 (refd)

Hoo Thian Siong v PP [1988] 2 MLJ 401 (refd)

Hotel Equatorial (M) Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor [1984] 1 MLJ 363 (refd)

Makhanlall & Co Ltd, Re [1969] 1 MLJ 36 (distd)

Maleb bin Su v PP [1984] 1 MLJ 311 (refd)

Mohd Shahriman Mohd Khairil v PP & Anor [1998] 2 CLJ 855 (folld)

Mohd Shaipul Nizam Ahmad v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1998] 2 CLJ 875 (refd)

Overseas Investment Pte Ltd v Anthony William O'Brien & Anor [1998] 3 MLJ 332 (folld)

PP v Chin Keow [1947] MLJ 55 (refd)

PP v Soh Ted Foh [1990] 2 MLJ 382 (refd)

Roshidi bin Mohamed, Re [1988] 2 MLJ 193 (refd)

Wong Kon That & Ors v Ketua Komandan Pusat Serenti Karangan, Kulim & Anor [1998] 3 MLJ 380 (refd)

Wong Soo Teong (trading as Chop Yeok Lan) v Long Foo Kang & Anor [1996] 2 BLJ 47 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 307, 323
Drug Dependants (Treatment and Rehabilitation) Act 1983 s 6(1)(a), (2), (4), (5)
Federal Constitution art 5(2)

TY Teoh (*TY Teoh & Partners*) for the applicant.
Mohd Abazafree bin Abbas (Deputy Public Prosecutor) for the respondents.

Abdul Wahab J: The applicant was arrested on 13 March 1998 and brought before the magistrate on 25 March 1998, where he was ordered to be admitted to Pusat Pemulihan Serenti, Tiang Dua, Malacca for a period of two years under s 6(1)(a) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 (Act 283) ('the Act'), which reads as follows:

> 6 Magistrate's order which may be made on a drug dependant.
>
> (1) Where a person who has undergone the tests referred to in section 3 or 4, and, in consequence of such tests, is certified by a government medical officer or a registered medical practitioner to be a drug dependant, the officer shall produce him, or cause him to appear before a Magistrate and if the Magistrate, after giving such person an opportunity to make representations —
>
> (a) is satisfied that such person requires to undergo treatment and rehabilitation at a Rehabilitation Centre, order such person to reside at such Centre for a period of two years to undergo treatment and rehabilitation and thereafter to undergo after-care in accordance with the provisions of this Act relating thereto; ...
>
> (b) ...
>
> Provided that where such person fails to execute such bond an order under paragraph (a) shall be made against him by the Magistrate.
>
> (2) ...
>
> (3) The Magistrate shall, before making an order either under paragraph (a) or (b) of subsection (1), consider a report by a Rehabilitation Officer on such person, a copy of which shall be supplied to such person, and which shall be read out and explained to him.
>
> (4) In making an order under subsection (1), the Magistrate shall have regard to the circumstances of the case, and the character, antecedents, age, health, education, employment, family and other circumstances of the person against whom the order is proposed to be made.
>
> (5) A certificate under subsection (1) purporting to be signed by a government medical officer or a registered medical practitioner shall be receivable by a Magistrate without proof of the signature thereon, and the Magistrate shall accept it as proof of its contents, unless the contrary is proved.

In the supporting affidavit to the application, it was alleged as follows: A

5 Di sini saya ingin merujuk kepada sesalinan nota-nota keterangan yang dilampirkan sebagai eks 'I-2' (selepas dan ini dirujuk sebagai 'nota tersebut') dan mengatakan berikut:

(a) Seperti dengan laporan doktor dan laporan kimia saya, diberitahu oleh pemohon bahawa laporan pegawai pemulihan dadah ('laporan PPD') tidak di sampaikan kepada pemohon. Nota tersebut yang mengatakan pemohon ada menerima laporan doktor dan laporan kimia adalah dinafikan. Tambahan, saya juga diberitahu oleh penama bahawa, dan oleh kerana saya juga berada di mahkamah pada 25 Mac 1993, walaupun kedua laporan itu dibacakan kepada beliau, penama tidak diterangkan sebab dan akibat sekiranya penama mengakui dan/atau menyetujui laporan-laporan tersebut dan juga berkenaan perintah yang boleh dibuat terhadap penama. Pada ingatan saya, pemohon tidak mengakui bahawa dia adalah seorang penagih dadah kepada Tuan Majistret; B C

(b) Selanjutnya, saya tahu laporan PPD tidak diserahkan kepada penama. Saya juga diberitahu oleh penama dan berada di mahkamah bila laporan PPD dibacakan tetapi mengatakan kandungannya tidak diterangkan dan, oleh itu, kami memang tidak tahu dan tidak sedar akibat dan kesan sekiranya penama mengakui dan menyetujui laporan PPD. D

6 Dalam keadaan di atas, kami tidak tahu perintah yang boleh dibuat terhadap penama boleh memberi kesan seperti perintah tersebut. Ini terutama bila kami diberitahu bahawa pengakuan pemohon tidak akan memberi kesan seperti perintah tersebut. Pemohon disyorkan bahawa beliau dapat diberikan bon atas pengakuan tersebut. Keluarga pemohon sekarang berasa kecewa dan dukacita atas penghantaran pemohon ke Pusat Serenti Tiang Dua Melaka selama dua tahun. Walaupun nota tersebut mengatakan tuan majistret, dalam keputusan beliau membuat perintah tersebut, telah mengambil kira hal keadaan kes, watak, riwayat, umur, kesihatan, pelajaran, pekerjaan keluarga dan hal keadaan lain pemohon sendiri, kami mengatakan kehendak peruntukan s 6(4) Akta tersebut tidak dipatuhi atas fakta- fakta yang disebutkan diatas. Tambahan, kami sememangnya memerlukan khidmat peguam sekiranya kesan atau akibat pengakuan pemohon diterangkan dan difahamkan. E F G

There were no affidavits in reply filed to contest the above allegation. That being the case, the court must conclude that the allegations above are not denied and are therefore admitted to be true: see *Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 332.

Notwithstanding this grave non-compliance with the Act, En Mohd Abazafree, federal counsel, has taken the unusual course of objecting to the application. The objection is purely on a technical point: that the applicant should have applied by way of certiorari rather than by a writ of habeas corpus as employed in this application. H

It was urged upon this court that the order made by the magistrate is a valid order until it has been set aside by a court of competent jurisdiction, and that the correct procedure to do so would be by a writ of certiorari. I

It has been held by the High Court in *Ahmad Bashid Abdul Malek & Yang lain v Timbalan Menteri Dalam Negeri, Malaysia & Yang lain* [1998] 6 MLJ 112, *Mohd Shaipul Nizam Ahmad v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1998] 2 CLJ 875 and *Wong Kon That & Ors v Ketua Komandan Pusat Serenti Karangan, Kulim & Anor* [1998] 3 MLJ 380 that the hearing before the magistrate is a judicial hearing and that such order remains valid until it has been set aside by a court of competent jurisdiction, and that the appropriate procedure for doing so is by way of a writ of certiorari and not by way of a writ of habeas corpus. However, other High Courts in *Mohd Shahriman Mohd Khairil v PP & Anor* [1998] 2 CLJ 855 and *Bohari Sukimin v Ketua Institusi Pusat Serenti Rawang & Anor* High Court, Kuala Lumpur Arim Application No 44–4–98, took the view that an application for a writ of habeas corpus is also available.

The starting point is art 5(2) of the Federal Constitution of Malaysia which provides as follows:

> Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the Court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the Court and release him.

The procedure to do so is normally by a writ of habeas corpus. Lest it be misunderstood, the writ of habeas corpus is not limited to cases where a person has been arrested, but the true basis is that the person has been unlawfully detained. Thus a writ of habeas corpus may lie even though the initial arrest is lawful, but that by some subsequent non-compliance, the continued detention becomes unlawful. Thus, the explanation of Lord Woolf and Professor Jeffrey Jowell in their book *Judicial Review of Administrative Action* (5th Ed), is in closer accord with the language of art 5(2) of the Federal Constitution:

> The specific purpose of the remedy is to secure the release of a person who is unlawfully detained.

The applicant, pursuant to an order under s 6(1)(a) of the Act, is being held in Pusat Pemulihan Serenti, Tiang Dua, Malacca. That the order amounts to a detention at Pusat Pemulihan Serenti, Tiang Dua, Malacca is not at issue since there is no question that the applicant could walk out of that place at any time that he may wish.

Now, an order under s 6(1)(a) of the Act is made by a magistrate. Given that other provisions of the Act made references to the 'Magistrate's Court', it appears that the legislature did not intend that the action under this section should be that of a magistrate's court, but rather of a magistrate. The Supreme Court in *Ang Gin Lee v PP* [1991] 1 MLJ 498 at p 500, dealt with this question and concluded:

> In a careful judgment, the learned judge based his rulings on two main grounds. First, the learned judge found that the powers conferred on the magistrate by s 6 of the Act under which the order was made is expressly conferred on the 'Magistrate' as distinct from 'Magistrate's Court' and that s 24(1) of the same Act specifically provides that any power or jurisdiction

conferred on a magistrate under ss 4 and 6 (amongst others) over matters specified therein may be exercised by the magistrate at any place whether such matters arose within or outside the local jurisdiction of the magistrate or within or outside the local limits of his court notwithstanding anything to the contrary in the Subordinate Courts Act 1948 or the Criminal Procedure Code (FMS Cap 6) or any other written law.

At a glance this first ground may seem pedantic but a closer examination of provisions of law relating to the jurisdiction of the magistrate shows the merit of this ground.

The Supreme Court, while appreciating that the order under s 6 of the Act is penal in nature, in that the person is probably being held against his will, accepted *Maleb bin Su v PP* [1984] 1 MLJ 311 that the magistrate's decision is final, and the reasoning of *PP v Chin Keow* [1947] MLJ 55 and *Amand v Home Secretary & Anor* [1943] AC 147 that the order of the magistrate under s 6 of the Act is not in respect of a criminal case or matter.

Section 307 of the Criminal Procedure Code provides that any person who is dissatisfied with any judgment, sentence or order pronounced by a magistrate's court in a criminal case or matter to which he is a party may prefer an appeal to the High Court against such judgment, sentence or order.

The order under s 6 of the Act not being an order in a criminal case or matter, there can be no appeal under s 307 of the Criminal Procedure Code.

The Supreme Court concluded in *Ang Gin Lee v PP* at p 500, that:

The criminal jurisdiction of a First Class Magistrate is provided in s 85 of the Subordinate Courts Act 1948. Section 26 of the Courts of Judicature Act 1964 (Act 91) provides that the appellate criminal jurisdiction of the High Court shall consist of 'the hearing of appeals from subordinate courts according to any law for the time being in force within the territorial jurisdiction of the High Court.' The term 'subordinate court' is defined in s 3 of Act 91 to mean any inferior court from the decisions of which by reason of any written law there is a right of appeal to the High Court.

It would seem to us that the legislative scheme of s 6 of the Act viewed with the provisions of criminal jurisdiction and appeal in the two legislation referred to show quite clearly that the order of the magistrate under s 6 of the Act is not an order appealable to the High Court. ...

There is no restriction that a statute or law can confer a power or discretion upon a court only. Statute law may confer a power or discretion upon an official. In this case a magistrate. Such statute or law may provide specific criteria to be applied, or procedure to be adhered to. Such power or discretion is generally described as exercised quasi-judicially. The power or discretion may not be exercised capriciously or at will. But while an order or decision under such power or discretion, is not strictly a judicial act, it is better described as the action of a tribunal. The High Court nevertheless has an inherent supervisory jurisdiction over such lesser tribunals.

The Federal Court described this function in *Hotel Equatorial (M) Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1984] 1 MLJ 363 at p 371 as follows:

> In the exercise of its inherent supervisory jurisdiction over inferior tribunals of limited jurisdiction the High Court must always remember that it is not sitting as a Court of Appeal to review the findings of the inferior tribunals. The High Court, it must be observed, has no jurisdiction to consider the merits of the case; its only function is to consider whether the inferior tribunal has performed its duties according to law. ...

Not supplying a copy of the report by a rehabilitation officer to the applicant, as alleged at para 5(b) of the supporting affidavit and which allegation was not denied by the respondents, is in clear breach of s 6(3) of the Act. Indeed, since the consequence of an order under s 6 of the Act is penal in character, there must be strict compliance with the terms of the legislation authorizing the order: see *Daud bin Salleh v Superintendent, Sembawang Drug Rehabilitation Centre* [1981] 1 MLJ 191; *Wong Soo Teong (trading as Chop Yeok Lan) v Long Foo Kang & Anor* [1996] 2 BLJ 47.

An application in certiorari is normally used to bring to the High Court the decision of an inferior tribunal or authority for review, and, where it does not pass the test, it is quashed. An example is the case of *Re Makhanlall & Co Ltd* [1969] 1 MLJ 36. In that case the magistrate was found to have acted in excess of his jurisdiction under the Local Government Integration Ordinance 1961 and as a result the order had to be quashed by certiorari. *Mohd Shaipul Nizam Ahmad v Menteri Hal Ehwal Dalam Negeri Malaysia & Ors, Ahmad Bashid Abdul Malek & Yang Lain v Timbalan Menteri Dalam Negeri, Malaysia & Yang lain* and *Wong Kon That & Ors v Ketua Komandan Pusat Serenti Karangan, Kulim & Anor* therefore took the view that the appropriate procedure is to proceed by way of certiorari and not by habeas corpus.

I would respectfully agree that certiorari is the logical course, since the respondents in this case are lawfully holding the applicant pursuant to an order of the magistrate under s 6 of the Act. But that is not to say it is necessarily the only course open to the applicant. Regrettably it does not appear from the judgements above that this was urged upon the High Court for consideration.

It is to be noted that *Re Makhanlall & Co Ltd* did not involve the detention of any person. Habeas corpus did not arise in that case. More importantly, in *Ang Gin Lee v PP*, the Chief Justice (Malaya), delivering the judgment of the Supreme Court, having concluded that there is no appeal against an order of the magistrate under s 6 of the Act, proceeded to cite three cases under s 6 which had been brought before the High Court: *Hoo Thian Siong v PP* [1988] 2 MLJ 401; *Re Roshidi bin Mohamed* [1988] 2 MLJ 193; and *PP v Soh Ted Foh* [1990] 2 MLJ 382. *PP v Soh Ted Foh* was brought to the High Court by way of revision, having been referred to it under s 323 of the Criminal Procedure Code. Closer to the circumstances of this case are *Hoo Thian Siong v PP* and *Re Roshidi bin Mohamed*, in respect of which the Chief Justice had this to say:

> To complete the record it may be noted that there are at least three reported cases brought to the High Courts by persons affected by an order under s 6 of the Act.

One is *Hoo Thian Siong v PP* which was an application for habeas corpus challenging the order of the magistrate on the ground that he was not represented by counsel at the hearing. The learned judge there, Mustapha Hussain J, ruled that it was encumbent on the learned magistrate to give the applicant the opportunity of making a representation.

There was also an application made to the High Court in Kangar in *Re Roshidi bin Mohamed.* There the applicant contended that the magistrate did not comply with the various subsections of s 6 of the Act. The learned judge, Mohamed Ariff J, held that in the absence of the record of proceedings kept by the learned magistrate it was impossible to hold that the mandatory requirements of the law had been complied with and granted the application.

It is clear that the Supreme Court accepted that an application in habeas corpus is an available procedure. The conclusion is that certiorari is not an exclusive procedure. It ought to be kept in mind that not all orders under s 6 of the back Act involve detention. Where an order does not involve detention, the only course to quash such an order is an application in certiorari. However, in an order that involves detention, there is nothing to say that an application in habeas corpus is not available.

To restrict a person by requiring that he must apply by way of certiorari rather than by habeas corpus would be contrary to the spirit and intent of art 5(2) of the Federal Constitution which does not impose a restriction as to the procedure to how a complaint is to be made. Indeed art 5(2) not merely empowers, but requires a High Court or a judge thereof, upon receiving a complaint and unless he is satisfied the detention is lawful, to issue an order for the detenue to be produced before the court and release him. While certiorari is a discretionary power of the High Court, a habeas corpus is as of right under art 5(2) of the Federal Constitution. Where it is not disputed that a copy of the report of the rehabilitation officer has not been supplied to the applicant, it is abundantly clear that his detention under s 6 of the Act is unlawful and the court must order the persons holding him to produce him before the court to be released.

Suriyadi J and Chin Fook Yen J in *Mohd Shahriman Mohd Khairil v PP & Anor* and *Bohari Sukimin v Ketua Institusi Pusat Serenti Rawang & Anor* respectively, discussing on the basis of largely different sets of case references, held that a writ of habeas corpus is available in addition to certiorari where detention is involved. I respectfully agree with their conclusions.

To summarize, even though normally a writ of certiorari is the procedure to be adopted to quash the earlier order, a writ of habeas corpus becomes an available alternative where the earlier order involves detention. It would be contrary to the spirit and intent of art 5 to refuse a writ of habeas corpus where it is clearly undisputed that s 6 of the Act has not been complied with. To reject the application and to require the applicant to apply by way of certiorari, would in this case make the right under art 5 illusory.

Application allowed.

Reported by Mohd Rizal Abidin